

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-217242 **DATE:** July 23, 1985
MATTER OF: All Weather Contractors, Inc.

DIGEST:

1. Even assuming low bid is mathematically unbalanced, low bid is not materially unbalanced since protester has not shown estimates stated in invitation for bids (IFB) for indefinite quantity contract are unreliable and that award to low bidder will not result in lowest cost to government. Protester's challenges to estimates primarily concern provisions properly included in IFB to make bidders aware of risks involved in performing contract, and protester has not shown that government will not require services for the full estimated quantities.
2. Requirement under District of Columbia solicitation, set aside for minority business participation, that bidder submit with its bid certification from an agency of the District of Columbia Government that bidder is a minority business enterprise pertains to the bidder's eligibility to bid. Therefore, GAO finds that the fact that the bidder is certified at bid opening excuses the bidder's failure to provide evidence of the certification with its bid.

All Weather Contractors, Inc. (AWC), protests the award of a contract for the intra-plant hauling of sludge at the Blue Plains Wastewater Treatment Plant to Jones & Artis Construction Company (J&A) under invitation for bids (IFB) No. 0002-AA-23-0-5-MR issued by the Government of the District of Columbia (D.C. Government). AWC complains that the awardee's bid should not have been accepted because the bid was unbalanced and did not include the required minority business enterprise (MBE) certificate. We deny the protest.

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The invitation solicited bids for two indefinite quantity contracts. The contract in question here called for the following eight services at the plant for 1 year: (1) operation of the sludge loading facilities at three points of discharge at the Solids Processing Building; (2) hauling the discharged sludge from the Solids Processing Building to the temporary storage tanks at the plant; (3) operation of the reloading facilities at the temporary storage tanks; (4) hauling sludge from either the Solids Processing Building or the temporary tanks to the compost site at the plant; (5-6) cleaning the temporary storage tanks; (7) clearing snow off roads in the plant; and (8) performance of all other work specified in the IFB, but not included in items 1 through 7, such as overall supervision and maintenance of on-site facilities and equipment.

The solicitation listed estimated quantities for each item and provided that, except for the item for snow removal, the D.C. Government would order at least 50-percent of the estimated quantity for each item. The solicitation also noted that the D.C. Government was contemplating the construction of certain facilities which would eliminate the need for items 1 through 4, for hauling of sludge and operation of certain facilities, and consequently, the contract for these items could be terminated as early as the end of the eighth month. Award was to be made in the aggregate to the lowest bidder. The low bid was to be determined by multiplying the estimated quantity for each item by the unit price bid for that item to arrive at the total cost for each item and then adding the total cost of the items to obtain the total bid price.

AWC alleges that J&A submitted a mathematically and materially unbalanced bid. It contends that J&A bid nominal prices for items 1 through 4, as evidenced by comparing J&A's prices with prices for those items under the previous contract which was performed by J&A, the actual cost for performing the services and AWC's bid prices. AWC asserts that, for example, J&A's bid price for item 8, covering work not included in items 1 through 7, is four times greater than AWC's bid price and therefore is an unrealistically high price for that work. Thus, AWC concludes that J&A's bid is mathematically unbalanced.

AWC further contends that J&A's bid is materially unbalanced because the estimated quantities included in the solicitation are not an accurate representation of the D.C. Government's anticipated needs and therefore there is no reasonable expectation that J&A's bid will provide the

lowest ultimate cost. AWC points out that there are at least two scenarios under which J&A's bid would not be low. AWC asserts that J&A is low bidder only if substantially all of the estimated quantities for items 2 through 4 are ordered during the 12-month period and points out that only 50 percent of the estimated quantities is guaranteed under the solicitation. Also, AWC argues that although the contract term is for 12 months, the solicitation provides that the services in items 1 through 4 may be terminated as early as the end of the eighth month of the contract and that J&A is not low if the contract for items 1 through 4 are canceled after 8 months.

The D.C. Government acknowledges that there are variables which cannot be predicted in projecting quantities of sludge, but it argues that the estimated quantities included in the solicitation are a reasonably accurate representation of its anticipated needs and they permit a determination of the lowest cost. The D.C. Government explains that its estimates for all items were based on past operating experience and discussions with the plant administrator concerning the capacities of the various plant facilities.

Our Office has recognized the twofold nature of bid unbalancing. First, the bid must be evaluated mathematically to determine whether it is unbalanced. This evaluation focuses upon whether each bid item carries its share of the cost of the work and of the contractor's profit/overhead or whether the bid is based upon nominal prices for some work and enhanced prices for other work. Second, if found to be mathematically unbalanced, an assessment must be made of the cost impact of that bid, that is, whether the bid is materially unbalanced. Unless there is a reasonable doubt that, by making award to a party submitting a mathematically unbalanced bid, the award will not result in the lowest ultimate cost to the government or there is evidence of some irregularity of such substantial nature as will affect the competitive bidding system, the bid should not be considered materially unbalanced. ABC Siding & Remodeling, B-213390, July 10, 1984, 84-2 C.P.D. ¶ 32. We have found material unbalancing only where estimates for the work are not valid or where evaluated option years are not reasonably expected to be exercised. Porta-John Corporation, B-218080, Mar. 19, 1985, 85-1 C.P.D. ¶ 325.

Here, AWC asserts that the estimates for the work included in the solicitation are invalid and fostered the unbalanced bidding. Where an agency solicits bids for a requirements contract on the basis of estimated quantities, the agency must base its estimates on the best available information. There is no requirement, however, that the estimates be absolutely correct. Rather, the estimated quantities must be reasonably accurate representations of anticipated actual needs. Gulf Coast Defense Contractors, Inc., B-212641, Feb. 28, 1984, 84-1 C.P.D. ¶ 243. The mere presence of a risk factor in the government estimate does not render the estimate inaccurate, since there is no requirement that competitive bidding be based on specifications stated so precisely that they eliminate the possibility that the successful contractor will encounter unforeseen conditions or be required to perform slightly more or less work than specified. Natural Landscape Contractors, Inc., B-209745 et al., June 28, 1983, 83-2 C.P.D. ¶ 32.

A protester challenging an agency's estimates bears the burden of proving that these estimates are not based on the best information available, otherwise misrepresent the agency's needs, or result from fraud or bad faith. Id. AWC, however, has not submitted any evidence to support its allegation that the estimates do not accurately represent the D.C. Government's anticipated needs. In its only specific challenge to the figures included in the IFB, AWC states that in developing the estimate for hauling sludge to temporary tanks, the D.C. Government failed to consider an unknown amount of sludge which will be sent to off-site locations and will never be delivered to the temporary storage tanks. However, the protester does not carry its burden of proving this statement, nor does it demonstrate that any of the other estimated quantities are not based on the best available information. Further, the estimates included in the solicitation were primarily based on experience and our Office has approved the use of estimates developed on such a basis. See Adam II, Limited, B-209194, July 21, 1983, 83-2 C.P.D. ¶ 102.

Rather than contending that the estimates are inaccurate because the best available information was not used, AWC essentially contends that the estimates are uncertain because the risks involved in performance of the contract may affect the actual quantities hauled. The D.C. Government noted in the solicitation that proposed construction might lead to early termination of a portion of the contract and that post-liming operations might temporarily

reduce the quantity of sludge hauled to the storage tanks. Since the D.C. Government was not certain that these events would occur during the term of the contract, the D.C. Government stated these risks as possible contingencies under the contract in order to accurately reflect conditions at the site. The D.C. Government also guaranteed a 50-percent of estimated quantity minimum.

In an indefinite quantity contract there is no assurance that a contractor will be paid for anything more than the quantity minimum. Contracting on an indefinite quantity basis poses certain risks that potential contractors may reflect in their proposal prices. See D.C. Material Management Manual § 2620.3F (1974 ed.); N.V. Philips Gloellampenfabriken, B-207485.3, May 3, 1983, 83-1 C.P.D. ¶ 467. We believe the D.C. Government acted reasonably by providing a minimum estimated quantity and notifying bidders of the elements of risk in undertaking this indefinite quantity contract.

Furthermore, AWC has not alleged, and nothing in the record indicates, that the D.C. Government will not require services for the estimated quantities upon which the determination of lowest cost was based. The risk factors included in the IFB were only possible contingencies. In fact, the D.C. Government indicates that upon reviewing its estimates after this protest was filed, it anticipates requiring quantities substantially equivalent to the estimated quantities and it has determined that the contemplated construction would not be completed within the term of the contract and therefore the contract would not be terminated early.

The solicitation called for award of a 12-month contract and bids were evaluated on a 12-month basis. If AWC disagreed with the 12-month contract term as not reflecting the D.C. Government's needs, it should have filed its protest with our Office prior to the opening of bids since the contract term was apparent on the face of the solicitation. See Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1985).

AWC also points out that the estimated quantity of sludge contained in the description for items 2 and 3 indicates a different quantity than the quantity specified in the schedule. The discrepancy, however, is insignificant in that it amounts to less than 10 percent of the total quantity and it does not affect the determination that J&A's bid is low. To the extent AWC is alleging that this

discrepancy is an impropriety in the specifications, it is untimely in that such protests must be filed prior to bid opening. Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1).

AWC contends that J&A could control the quantities ultimately hauled to the temporary tanks and to the onsite plant under this contract and thus make use of this alleged advantage in preparation of its bid. AWC, however, has not presented any evidence establishing that J&A will be able to regulate the quantities transported under this contract. We also note that the solicitation provides that:

"[t]he contractor or his representative shall follow written orders from the Technical Representative [Administrator of Water and Sewer Utility Administration] or his designee regarding loading of the sludge vehicles"

Further, the D.C. Government advises that although J&A may be performing contracts which affect this one, D.C. Government personnel ultimately exercise control of the quantity of sludge to be loaded for transport under this contract.

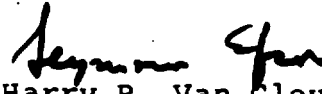
We conclude that the protester has not shown that there is a reasonable doubt that award to J&A would not result in the lowest cost to the government or that the estimates did not reflect the government's anticipated actual needs. Under these circumstances, it was proper to accept J&A's bid.

Finally, AWC alleges that the solicitation, which was restricted to minority bidders, required that, pursuant to the Minority Contracting Act, D.C. Code § 1-1141 et seq. (1981), a copy of MBE letter of certification issued by the D.C. Minority Business Opportunity Commission be attached to each bid and that J&A did not comply with this requirement. It states that the failure to provide this information rendered the firm's bid unacceptable.

We have held that the submission of MBE certification with a bid pertains to the bidder's eligibility to bid and is similar to the small business certification requirements for small business set-asides that the bidder be small at bid opening. Parker-Kirlin, Joint Venture, B-213667, June 12, 1984, 84-1 C.P.D. ¶ 621. Consequently, the critical question is whether the bidder is certified as an MBE at the time of bid opening and not whether the bidder

has provided evidence of certification with its bid. Id.
The record indicates that J&A was certified as an MBE at the
time of bid opening and therefore its bid was acceptable.

The protest is denied.

for 
Harry R. Van Cleve
General Counsel